Limitations of Liability in the Modern Carriage World

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Overview

- General Modal Limits of Liability discussion

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- Where have things gone ‘murky’ as of late?

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  - Multi-modal carriage - Canada
  - Multi-modal carriage - United States
- The “*Rotterdam Rules*”

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- General Modal Limits of Liability discussion
- Where have things gone ‘murky’ as of late?
  - Road carriage
  - Multi-modal carriage - Canada
  - Multi-modal carriage - United States
- The “*Rotterdam Rules*”
- Some Practical Considerations

Standard Scenario

- Road - $2 / lb. [no declared value]
- Air = Montreal Convention limits [no d.v.]
- Ocean = Hague Visby limits [no d.v]
- Rail = by contract
- Freight Forwarding = by contract / CIFFA

1. Road Carriage

- Ontario *Highway Traffic Act*
  - S. 191.01(1)
    - Every contract of carriage for a person to carry the goods of another person by commercial motor vehicle for compensation shall contain the information required by the Regulations and shall be deemed to include the terms and conditions set out in the Regulations

Road Carriage

- S. 191.01(2)
  - Where a person is hired for compensation to carry the goods of another person by commercial motor vehicle in circumstances where no contract of carriage has been entered into, then a contract of carriage shall be deemed to have been entered into, and the terms of the deemed contract of carriage shall be as set out in, and shall apply to such persons as are set out in the Regulations

Road Carriage

Regulation 643/05

- 4.(1) Information required in a **Contract of Carriage** - General Freight…
  - i) space for declared valuation, if any…
  - …
  - n) a statement to indicate that the uniform conditions apply
  - …
  - q) a signed acceptance.. By carrier and consignor of the terms in or deemed to be in the contract

  (2) The Uniform Conditions of Carriage in Sch. 1 are deemed to be the terms of every contract of carriage…

Road Carriage

- Old Rules, New Practices
  - 1) Shipper booking contract usually negotiates a freight rate with knowledge that goods could be protected by a declared value, with enhanced freight rate, but accepts risk of loss on the limited liability amount because there is insurance

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  - 1) Shipper booking contract usually negotiates a freight rate with knowledge that goods could be protected by a declared value, with enhanced freight rate, but accepts risk of loss on the limited liability amount because there is insurance
  - 2) Carrier picks up cargo from an origin point in circumstances not lending themselves to getting a signature or ‘issuing’ a bill of lading

Road Carriage

Old Rules

- *Corcoran v. Ehrlick Transport* [Alta. 1984]
  - no b/l = no right to limit liability: shipper deprived of chance to declare a value
- *Hoskin v. West* [Alta. 1988]
  - loss occurred during loading, prior to b/l issuance
  - Held, on basis of policy: terms and conditions 'deemed' in contract: court sees 'contract' distinct from mere form of bill of lading

Road Carriage

Old Rules

- 'deemed' provisions do not apply where regulation not complied with: *Arnold Bros. v Western Greenhouse Growers Coop. Assn.* [1992 B.C.]

…. however it might be relevant if the evidence shows a mutual intent that a bill of lading might not be necessary: *Paine Machine Tool Inc.* *v.* *Can-Am West Carriers Inc.* [2003 B.C.]. In dissent:

…."in principle, the regulations should be adhered to unless it is proved that the parties agreed to other terms, expressly, by course of dealings or industry practice…"

Road Carriage

- Old Rules
  - *Valmet Paper v. Hapag Lloyd* [2004 B.C.]
    - Land leg to international shipment
    - No d.v. on master OBL
    - Driver did not issue road b/l
    - Trucker could not limit: deficient form of b/l; it was not issued and did not bear shipper's signature

Road Carriage

- *Port Enterprises v Parsons Trucking* [2004 Nfld]
  - Carrier could rely on lack of notice defence in uniform b/l conditions although no b/l issued -
  - “deeming” provisions applied in favour of carrier
- *Clark v. Sameday Courier* [1992 N.B.]
  - Carrier denied ‘deemed’ conditions of carriage where it had not issued a b/l but only a manifest incorporating ‘all statutory terms’

Road Carriage - Responses?

- To *Valmet*: *s. 37.45 B.C. Reg'n 135/2003*
  - "a carrier who accepts freight … need not issue … a bill of lading in paper form if
  - A) in the ordinary course of the carrier's business the carrier uses electronic bills of lading, and
  - B) the Director has, on application of the carrier, … provided a letter of exemption from the requirement
- Robust int'n of 'Deeming" provisions; discerning 'contract of carriage' from 'bill of lading'
- Application of an intention test: past dealings; analysis of booking of contract at the front end, before the issuance of a bill of lading / search for satisfaction of intentions vs. frustration

Road Carriage

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Road Carriage

- Possibilities, by province:
  - provisions not deemed to apply, but must be in, or incorporated into an issued or signed document: **B.C.**
  - provisions are deemed to apply, as a matter of law, it being open as to who of carrier and shipper issues the required bill of lading: **Alta.**
  - provisions are deemed to apply, as a matter of law, but carrier must issue bill of lading: **N.S.**
  - Provisions are deemed to apply, as a matter of law, with the ‘contract of carriage’ having to contain various provisions: **Ontario**

2. Multi-modal Carriage: Canada

- Boutique Jacob v. CPR et al [Fed. C.A. 2008]
  - Shipper hires Panalpina, forwarder, to arrange door to door Hong Kong to Montreal move
  - Panalpina, as agent, hires Pantainer Ltd. [NVOC] to perform the move; Pantainer issues through bill of lading; no d.v.
  - Pantainer sub-contracts OOCL to perform the same door to door move; OOCL issues through bill of lading; likewise no d.v.
  - OOCL hires CPR pursuant to a confidential rate contract to carry cargo from VCR to MTL
  - Derailment during rail leg by CPR

Boutique Jacob

Boutique Jacob > Panalpina > Pantainer [NVOCC]

[buyer /shipper]

Hong Kong to Montreal

Montreal

[Forwarding agent]

[issues b/l] nvd

|

Subcontracts OOCL

[issues b/l] nvd

|

Subcontracts CPR

[Vancouver to Montreal]

[confidential contract citing CPR tariff]

Boutique Jacob

- **Boutique Jacob** sues for $71,000:
  - **Panalpina Canada** [action dismissed - only an agent]
  - **Pantainer** [action dismissed]:
    - while a carrier, b/l issued to shipper exempted liability "for loss or damage arising from any cause which carrier could not avoid… by due diligence"
  - **OOCL** [action dismissed]:
    - i) court noting that a) a shipper is bound by conditions of a contract between a bailee and a sub-bailee if shipper expressly or impliedly consented to the bailee making a sub-bailment with those conditions, and b) it matters not that Boutique Jacob had no knowledge of OOCL's terms and conditions

Boutique Jacob

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Boutique Jacob

- Pantainer b/l and OOCL b/l provided that Pantainer and OOCL 'could sub-contract on any terms'
- OOCL not liable:
  - i) similar exemption clause in it's b/l, and
  - ii) "Himalaya" clause in Pantainer b/l benefited OOCL - who could thereby rely on the same exemption clause that Pantainer did:

The Himalaya Clause

- *"Every servant or agent or sub-contractor of carrier shall be entitled to the same rights, exemptions from liability, defences and immunities in which carrier is entitled. For these purposes, carrier shall be deemed to be acting as agent or trustee for such servants or agents, who shall be deemed to be parties to the contract evidenced by this bill of lading".*

The case against CPR

- S. 137(1) *Canada Transportation Act* S.C. 1996 c.10 allows a rail carrier to limit liability if certain conditions are met:
  - A railway company shall not limit or restrict it's liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper or by an association or other body representing shippers…
  - At Trial: held that as no written agreement between Boutique Jacob and CPR, CPR could not rely on its argument that it could avail itself of the limitation of liability in the rate contract between it and OOCL

The case against CPR

Boutique Jacob > Panalpina > Pantainer [NVOCC]

[buyer /shipper] [Forwarding agent] [issues b/l] nvd

Hong Kong to Montreal

|

Montreal

Subcontracts OOCL

[issues b/l] nvd

|

Subcontracts **CPR**

[Vancouver to Montreal]

[confidential contract citing CPR tariff]

The case against CPR

- CPR could not rely on the Himalaya clause in either the Pantainer or the OOCL bills of lading - while otherwise coming within the scope of same - because ‘allowing this would defeat the purpose of s. 137’. CPR held liable for reduced quantum but without limitation.

The case against CPR

- On appeal to Fed. C.A.:
  - "Shipper" in s. 137 means 'person tendering freight and having control over the negotiation of the rail leg phase, namely OOCL - based on a review of the language of the statute and common sense
  - The confidential rate contract governing rail was not signed, but the court overlooked this on the basis that neither OOCL or CPR disputed its validity
  - Accordingly: CPR got to the same place [$1432] two different ways: **it's rate contract**, which provided it could avail itself of the ocean carrier's limit of liability or directly under the **ocean b/l Himalaya clause**

A practical approach

Boutique Jacob > Panalpina > Pantainer [NVOCC]

[buyer /shipper] [Forwarding agent] [issues **through** b/l] nvd

Hong Kong to Montreal

|

Montreal

Subcontracts OOCL

[issues **through** b/l**] nvd**

|

Subcontracts CPR

[Vancouver to Montreal]

[confidential contract citing CPR tariff]

Cami Automotive Inc. v. Westwood Shipping [2009] Fed. Ct. T.D.

- Westwood issues through b/l; no d.v.
- Japan - Seattle - VCR - Toronto
- Westwood sub-contracts C.N. for rail leg under a confidential rate contract, unknown to shipper
- Shipper was aware that Westwood needed to engage a rail carrier - the requisite ‘consent’ for downstream carrier CN to rely on its own contract…
- At trial: Westwood could limit to $500 [COGSA]

Cami Automotive Inc. v. Westwood Shipping [2009] Fed. Ct. T.D.

- What of CN?
  - Westwood was the ‘shipper’; therefore need not look for an agreement between point of origin shipper and CN
  - CN however did not properly incorporate limitation of liability into its contract with Westwood
  - CN however had the Himalaya clause argument: it could rely on the Westwood bill of lading COGSA limits just as Westwood could
  - Interesting: court applying a different ‘lens’: found s. 137 written agreement by Westwood having signed the waybill issued to point of origin shipper….

3. Multi-Modal Carriage of Goods: U.S.

- *Norfolk Southern Railway Company v. James N. Kirby Pty. Ltd.* [2004 USSC]
  - Same ingredients: Shipper hires forwarder to perform door to door move, who sub-contracts ocean carrier for door to door carriage, who sub-contracts NSR to perform rail carraige from port to an inland Alabama destination
  - Both forwarder b/l and ocean carrier b/l contain 'Himalaya' clauses for downstream carriers
  - Derailment during rail phase

Kirby

Shipper > Freight Forwarder [NVOCC]

[buyer /shipper] [issues house through b/l] nvd

Sydney,Australia to

Huntsville, Alabama

|

Australia

Subcontracts Ocean carrier

[issues main through ocean b/l] nvd

|

Subcontracts Norfolk Southern

[Georgia to Alabama]

[confidential contract citing

CPR tariff]

Kirby

- NSR likes lower limit in contract between ocean carrier and forwarder than found in shipper / forwarder contract
- Kirby: “no fair: we were not a party to that contract” + “state law governs”
- Held:
- 1. Whenever parties contract under a through bill of lading for an overseas intermodal shipment with on-carriage to a US destination, if the movement involves substantial ocean carriage, the through bill is a maritime contract subject to maritime law
- 2. “Period of Responsibility” Clause extending COGSA to inland destination; maritime law prevails over state law: “the shore is an artificial place to draw a line” - NSR could rely on ocean bill of lading defences under Himalaya clause

Kirby

- 3. Court had little difficulty applying the Himalaya clause in the shipper - forwarder through b/l … but NSR wanted the benefit of the clause invoking lower limits in the bill of lading issued by the ocean carrier to the forwarder…

  "when an intermediary contracts with a carrier to transport goods, the cargo owner's recovery is limited by the liability limitation to which the intermediary and the carrier agreed"

  = the "implied agency" rule

NSR therefore had its choice of the terms of either b/l

Kirby legacy

- U.S. rail and motor carriers get the protection and certainty of knowing they can rely on any upstream contract which provides benefits on downstream carriers, **and** they can also enforce the terms limiting liability within their own contracts with an intermediary

- But Kirby did not address “Carmack” surface carriage ‘uniformity’ regime…

Kawasaki Kisen Kaisha v. Regal Beloit Corp. [2010] USSC

- China - various points of delivery inland US
- Discharge at California, train derailment on Union Pacific line in Oklahoma
- Shipper sues K-Line and UP in California, who respond asserting ocean b/l Tokyo venue clause

Regal Beloit

- Held: venue clause effective
  - 1. Carmack not intended to apply to import shipments from non-adjacent foreign countries under a through b/l
  - 2. Carmack applies only when there is a true 'receiving carrier' [in first instance] in the U.S. i.e. the point of origin must be in U.S.
  - 3. *Regal Beloit* should also be followed when the carrier is a motor carrier [Royal and Sun Alliance v. Ocean World Lines [2010]]
  - 4. Regal Beloit reinforces that railroads, motor carriers and presumably freight forwarders can rely on upstream through bills of lading containing Himalaya clauses and they can also enforce the liability limits in their own contracts against the shipper

4. The *Rotterdam Rules*

- Shippers in *Regal Beloit* tried to argue that such rulings should not be made which might upset the pending adoption by the U.S. of the Rotterdam Rules… but, as the court ruled… there is nothing in those Rules that would offset this reasoning

The *Rotterdam Rules*

- UNCITRAL: “Convention on Contracts for the International Carriage of Goods, Wholly or Partly by Sea”
- Open for signature September 2009; 22 signatories - effective after 20th ‘ratifying’ state
- Born out of increasing awareness that the existing ocean carriage regimes do not accommodate modern era carriage of goods by sea

The *Rotterdam Rules - a new regime*

- Replaces existing conventions to provide a single uniform legal regime for carriage of goods by sea
- 18 chapters, 96 articles … comprehensive code
- Takes into account technological and commercial changes: containerization, door to door carriage, electronic transfer of documents
- Increased limits of liability: 667.67 SDRS to 875 per package, 2 SDR's to 3 per kilo
- "*wholly or partly by sea": "maritime plus"* -

The *Rotterdam Rules*

- Not a ‘true’ multi-modal regime - but a partial ‘network liability system’ [subject to existing Conventions and volume contracts]
- “Period of Responsibility”… extended to when carrier or ‘performing party’ receives the goods [inland point?] and delivers the goods [inland point?] including sea leg
- If loss or damage before loading, or after discharge, Convention rules will apply but… there are troubling and potentially confusing exceptions:
  - Volume Contracts [freedom of contract]
  - Application subject to ‘mandatorily applicable’ international instruments / uni-modal conventions in effect for non-sea leg

The *Rotterdam Rules*

- Practical effects on Canada / U.S.
  - Institutionalizes Himalaya clauses
  - Uniform extension to surface carriage of rules and limits of liability - for North American leg, if not a volume contract
  - For foreign leg, will have to research if ‘international instrument applicable’
  - Fixes higher limits: good bye to $500?

Some Practical Points

- The fundamentals remain the same: identify and allocate the risk
- Insuring road carriage risks: motor carrier, contingent liability, or cargo: know what is being done
- Insuring the liability of surface carriers in multi-modal transport: an election of defences?
- Insuring cargo destined for multi-modal carriage: limitations on recovery?

Some Practical Points

- Shippers and insurers of cargo: allocate risk at point of origin and consider protections for downstream carriers
- Wait and see regarding ‘Rotterdam’: increased liability limits, perhaps, with uniform liability rules, but is it a ‘volume contract?